

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

ASTI, INC.¹

Employer

and

Case 25-RC-9962
(formerly Case 12-RC-8517)

TRANSPORT WORKERS UNION,
LOCAL 509, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
2. The employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The name of the Employer appears as amended at the hearing.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time dispatchers employed by the Employer at its Miami, Florida facility; BUT EXCLUDING the Terminal Manager/Lead Dispatcher, all drivers, mechanics, shopmen, shop foremen, clerical employees, professional employees, guards, supervisors as defined in the Act, and all other employees.

ASTI, Inc. is a Florida corporation with a principal office and place of business located in Miami, and a second facility located in Ft. Lauderdale, Florida. ASTI provides ground-based transportation services, including charter and tour bus, minibuses and limousine services. Its Miami facility is comprised of approximately 117 full-time drivers, 17 part-time drivers, 3 minibus drivers, and 4 limousine drivers. The drivers are represented for purposes of collective bargaining by Local 1493, Amalgamated Transit Workers Union, which is presently a party to a collective-bargaining agreement with the Employer.

The Petitioner herein seeks to represent the approximately 7 dispatchers² employed at the Miami facility, for whom there is no history of collective-bargaining. The Employer maintains that all of the dispatchers are statutory supervisors under the Act and thus do not constitute an appropriate unit.

Relevant Facts

The Employer provides a variety of transportation services, including shuttle, minibus and limousine service, as well as charter and tour bus service. ASTI employs drivers, mechanics, mechanic helpers, fuelers, painters, painters' helpers, washers and cleaners who have been represented by the Amalgamated Transit Workers Union for at least twenty years. In addition to these employees and the disputed dispatchers, located at the Miami facility are also the Company's President, an Operations Manager, Safety Director, Assistant Safety Director, clerical employees, and a sales staff. The administrative staff, along with the sales and clerical staffs, are located in an office building, while the drivers, dispatchers, Safety Director and Assistant Safety Director work out of a trailer located in the Employer's bus yard. Contained in the trailer is the dispatch office and a drivers' room.

The Employer is operative 24 hours a day, 7 days a week. The dispatchers work nine-hour, five-day shifts, with generally two dispatchers on each shift. The dispatchers are primarily responsible for communicating to the drivers, on a daily basis, the assignments and vehicles available to them for use in performing their jobs each day. Each day, the dispatchers are given a Daily Dispatch Sheet which is generated by the Operations Manager and which lists all of the

² At hearing the parties stipulated that the recently created position of Terminal Manager/Lead Dispatcher is a supervisory position, and that the person who occupies this position possesses the power to effectively recommend the discipline of dispatchers. Accordingly, this position is excluded from the unit found appropriate herein.

transportation jobs which are to be performed that day, and the vehicle assigned to each job. The dispatchers, as required by the Employer's collective-bargaining agreement with the Transit Workers Union, contact each full-time driver (usually telephonically) in the order of descending seniority; read to each driver all outstanding dispatches for the day, and permit each driver, in accordance with his seniority, to select the dispatch which s/he wants to perform. This process is repeated until all of the dispatches are selected. With the apparent exception of the least senior driver, drivers are free to reject dispatches, and the dispatchers possess no authority to require that a driver accept a dispatch. The dispatchers also possess no authority to deviate from the dispatches established by the Operations Manager, by modifying or canceling dispatches. Nor can the dispatcher make assignments based on who s/he believes has the ability to best perform the assignment. If there are not enough drivers for the available work, the dispatchers use a list of part-time drivers. Although not contractually required to offer dispatches by seniority to the part-time drivers, testimonial evidence of record indicates that dispatchers often do so. Local ordinance requires that drivers who perform certain functions such as limousine driving and airport pick-ups and deliveries, possess a specified type of driver's license. Consequently, certain dispatches require that the dispatchers offer these assignments only to drivers who possess the requisite licenses, whether part-time or full-time drivers. On those occasions when the number of jobs exceeds the number of full-time and part-time drivers available, the extra work is out-sourced to other transportation companies by management. The work designated for out-sourcing is noted on the Daily Dispatch Sheets, and dispatchers are not involved in the decisions whether to out-source work or to which contractor to offer the work. If a driver refuses a dispatch, the dispatcher can take no action other than to offer the dispatch to the next driver in order of seniority. Although a full-time driver may decline one dispatch in favor of another, a driver who refuses to accept all dispatches is referred to management and is not offered further work until management reinstates the driver "on the board." The dispatchers play no role in determining whether or when such a driver will return to work. The dispatchers cannot authorize drivers to work overtime but rather, must assign overtime by seniority in accordance with the Employer's collective-bargaining agreement, and in accordance with Department of Transportation (DOT) regulations. For example, if there is overtime work available, the dispatcher is required to offer it to the most senior driver. If that driver has exceeded the amount of driving hours permitted under DOT regulations, the overtime work is offered to the next senior driver.

Mechanical problems and vehicular breakdowns on the road are telephonically reported by the drivers to the dispatchers. The dispatcher relays the information to a mechanic in the Employer's maintenance department. After talking with the driver, the mechanic decides what type of repairs the vehicle may need. If the mechanic determines that the vehicle is inoperable and another vehicle is required, he informs the dispatcher who in turn arranges for the vehicle to be towed. Where situations involve stranded passengers, the dispatcher contacts the closest available driver and asks him to pick up the stranded passengers, in accordance with company policy. He first calls the closest driver to the breakdown, or, if there is no driver in near proximity, he secures a driver by contacting drivers in order of their seniority. If the next senior driver is unavailable the dispatcher contacts part-timers, or drivers who have volunteered for overtime. Here again, the dispatcher follows a pre-arranged procedure established by the Employer.

Dispatchers are responsible for the daily dissemination of certain forms to drivers, such as a pre-job and post-job vehicle checklist, and DOT forms. While the dispatchers are required to collect these forms from the drivers after each driver completes his shift, they do not possess the authority to issue disciplinary action to drivers who refuse and/or fail to complete the forms. Instead, the dispatchers record the incident, as they do all noteworthy events which occur on their shifts, on a form which provides spaces for information under the designated topics of "General Remarks," "Book-offs," "Call In Sick," "Drivers not Calling for Report," and "Important Notes for Operations Manager." Also included in the daily forms are reports of accidents and other incidents such as customer complaints and conflicts between drivers and/or dispatchers that occurred on the shift. Drivers who are involved in accidents must complete designated forms which the dispatchers possess. Dispatchers are not involved in the investigation of the accidents. These accident forms along with the dispatcher's daily report forms are given to the Operations Manager at the end of each shift.

It is undisputed that dispatchers do not possess the authority to hire or fire. Nor do they possess the power to transfer, layoff, recall, or promote employees, or to effectively recommend such personnel action. The dispatchers do not evaluate the drivers; grant time off; or play any role in the drivers' contractual grievance procedure. Dispatchers cannot resolve drivers' problems concerning pay or insurance, but instead, they direct drivers to the appropriate management official who is able to resolve the problem. If a problem arises outside of the Company's office hours³, the Terminal Manager/Lead Dispatcher and Operations Manager are accessible to the dispatchers to provide instruction via pager and/or telephone. And while the dispatchers are salaried and the drivers are paid by the hour, the difference in pay is minimal. There is no record evidence of interchange between drivers and dispatchers.

Discussion

In representation proceedings the burden of proving that an individual is a statutory supervisor rests upon the party making the assertion, Northcrest Nursing Home, 313 NLRB 491, 496 fn. 28 (1993), and cases cited therein. The Board has a duty not to construe supervisory status too broadly, because the employee who is found to be a supervisor is denied employee rights which the Act is intended to protect, Westinghouse Electric Corp. v. NLRB, 424 F. 2d 1151, 1158 (7th Cir. 1970), enfg. 171 NLRB 1239 (1968), cert. denied 400 U.S. 831 (1970). Thus, to establish supervisory status, strong and compelling evidence is required and conclusionary statements by witnesses without supporting evidence are insufficient to establish supervisory authority, Sears, Roebuck & Co., 304 NLRB 193 (1991).

It is the Employer's position is that the dispatchers herein assign work to drivers exercising independent judgment; responsibly direct the work of drivers; possess the authority to suspend drivers; and adjust employee grievances. A close examination of the evidence indicates to the contrary, however.

³ Office hours are from 8:00 AM to 6:00 PM.

In respect to the assignment of work, the record indicates that dispatchers possess no authority to force a driver to perform any work, and offer dispatches to full-time drivers in accordance with the provisions of the Employer's collective-bargaining agreement with the union which represents the drivers, as well as in accordance with established Company procedures. In offering work to full-time drivers, the dispatchers are guided by the Daily Dispatch Sheet which determines the work to be performed each day, and the vehicle assigned to each dispatch. Dispatches are selected by full-time drivers in accordance with their seniority and ability. Even the assignment of excess dispatches to the part-time drivers requires no independent judgment since the dispatches are dispensed on essentially a rotating basis, and where a specific license is required, to those drivers who possess the license. The job assignments to the minibus and limousine drivers are made in the same manner as part-time bus drivers. They are assigned on a rotating or first available basis in accordance with the Company's established practice. Overtime work is offered to drivers in accordance with seniority, as provided by the Employer's contract, and dispatchers have no authority to select any particular driver for the available overtime.

Nor do the dispatchers responsibly direct the work of drivers. Rather, dispatchers routinely inform the drivers of the work they will perform as determined by management. They cannot prevent a driver from working nor can they modify the assignments given them by management. On some occasions dispatchers are required to combine different jobs of drivers. This practice is referred to as "hooking up" jobs. And while it may appear to involve the use of some judgment, it is not the independent judgment envisioned by Section 2(11) of the Act because it merely involves adding one short work assignment to another, to create a shift's worth of work. Dispatchers neither monitor the day-to-day performance of the drivers nor control the manner in which the drivers perform their jobs. The dispatchers cannot enter into commercial contracts with customers for the Employer's services or authorize repairs or payment for repairs. Mechanical failures are reported to the Employer's mechanics and it is they who determine the appropriate repair. Dispatchers do not make the decision whether to remove a vehicles from service. In the case of emergencies which leave passengers stranded, dispatchers adhere to established Employer procedures by attempting to locate substitute transportation for the passengers as soon as possible. A dispatcher first contacts the closest driver to the stranded vehicle, but if there is not a driver in near proximity to the emergency, the dispatcher follows seniority to locate a driver to pick up the passengers. If full-time drivers are unavailable, the dispatcher contacts part-timers, or drivers who have volunteered for overtime. Here again, the dispatcher follows pre-arranged procedures established by the Employer. Dispatchers cannot grant time off or approve sick leave for drivers. When a driver reports he is sick and unable to work, the dispatcher merely records this information on his/her daily report to the Operations Manager. Contrary to the Employer's assertion, the absence of on-site supervision during hours the administrative office is closed does not confer supervisory status upon the dispatchers, since the record indicates their superiors can be reached by telephone or pager if a serious situation arises and supervisory advice or instruction is needed, NLRB v. City Yellow Cab Co., 344 F.2d 575 (6th Cir. 1965).

Contrary to the Employer's assertion, dispatchers neither possess the authority to discipline drivers, nor to effectively recommend discipline. If a driver refuses to accept a dispatch, thereby refusing to work, the dispatcher reports it to the Operations Manager and offers the dispatch to the next driver on the list. It is the Operations Manager or other management

representative who determine whether a driver will be disciplined, and the nature of such discipline. The dispatchers' role in prospective discipline is purely reportorial. They document incidents of misconduct, but make no disciplinary recommendation. The reporting of misconduct without the concomitant authority to recommend corrective action, is not an indicia of supervisory status, Rest Haven Nursing Home, 322 NLRB 210 (1996). The Employer cites an example where a driver, upon his return to the dispatch office at the conclusion of his shift, engaged in a shouting match with a dispatcher for reasons unknown. The driver clocked himself off work and continued shouting, at which point the second dispatcher told the driver to go home. Contrary to the Employer's assertion, the dispatcher did not "send home" the driver in the sense urged by the Employer: she did not suspend the driver from work. The driver had already clocked out for the day before the dispatcher simply told him to go home. Even assuming, *arguendo*, that dispatchers possess the authority to send drivers home for flagrant violations of working conditions, such limited authority has not been found to constitute evidence of true supervisory status under Section 2(11) of the Act, Phelps Community Medical Center, 295 NLRB 486, 492 (1989), quoting Loffland Bros. Co., 243 NLRB 74, 75 at n. 4 (1979).

Dispatchers have no authority to resolve complaints from customers regarding drivers, but report them to the Operations Manager. Dispatchers cannot resolve grievances of the drivers or problems concerning pay, insurance or other terms and conditions of employment. The dispatcher either directs the driver to the appropriate supervisor who can resolve the problem, or notes it for the Operations Manager's attention.

In summary, the dispatchers' primary responsibility is to communicate job information to the drivers pursuant to pre-existing boundaries contained in the collective bargaining agreement and Company policy. Such communication and the manner in which it is accomplished does not involve or constitute responsible direction or the exercise of independent judgement as contemplated by Section 2(11) of the Act, New England Transportation Company, 90 NLRB 539 (1950); Yellow Cab, Inc., 131 NLRB 239 (1961), *enfd.* 344 F.2d 575 (6th Cir. 1965); Eastern Greyhound Lines, 138 NLRB 8 (1962); Mississippi Power & Light Company, 328 NLRB No. 146 (July 26, 1999) and cases cited therein. Accordingly, it is concluded that the dispatchers employed at the Employer's Miami facility are not supervisors within the meaning of Section 2(11) of the Act. In addition, since the dispatchers possess similar skills and perform identical job functions, share the same supervision, receive the same form of compensation, are subject to the same work rules and operating procedures, and otherwise share the same terms and conditions of employment, it is concluded that the dispatchers share a community of interest with one another, and therefore the petitioned unit is one appropriate for purposes of collective bargaining.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate herein at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Transport Workers Union, Local 509, AFL-CIO.

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director of Region 12 within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). Said Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received by Region 12, National Labor Relations Board, South Trust Plaza, Suite 530, 201 East Kennedy Boulevard, Tampa Florida, on or before the close of business (4:30 PM (EDS)), **July 27, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by August 3, 2000.

DATED AT Indianapolis, Indiana, this 20th day of July, 2000.

/s/Roberto G. Chavarry
Roberto G. Chavarry
Regional Director
National Labor Relations Board
Region 25
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, IN 46204-1577

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177-8560-5000